IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LA CEBADILLA ESTATES CORPORATION, an Arizona corporation, Plaintiff/Appellee, v. DINO SISNEROS and MELISSA SISNEROS, husband and wife, Defendants/Appellants.	2 CA-CV 2007-0087 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20065058

Honorable Sarah R. Simmons, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 Appellants Melissa and Dino Sisneros contest the trial court's entry of a judgment and order granting a permanent injunction in favor of appellee La Cebadilla Estates Corporation (the Association). The judgment enjoins the Sisneroses from using the property, Lot 90 of the La Cebadilla Estates subdivision,[1] "in connection with [their] vacation rental business" and from "allowing their unshielded exterior lights to be maintained upon" the property, and it awards the Association its attorney fees. The Sisneroses raise eight issues on appeal, contending the trial court erred by finding their short-term vacation-rental business prohibited by the Declaration of Restrictions (CC&Rs) governing La Cebadilla Estates, by finding the Association entitled to a hearing on damages for unjust enrichment, by denying the Sisneroses' requests for a jury trial or for a continuance, and by granting the Association its attorney fees. They further complain the injunction is "improperly broad and vague," the Association has "unclean hands" and thus cannot enforce the CC&Rs, insufficient evidence supports the trial court's conclusion that the exterior lights violate the CC&Rs, and the Association failed to provide a written complaint from a resident of the subdivision before enforcing the CC&Rs. Finding no error, we affirm the trial court's judgment and order enjoining the Sisneroses' activities.

[1]The address of the property relates to some of the issues on appeal and is 2302 North Camino Cascabel. For convenience in this decision, we also refer to it as Lot 90, as the parties did during trial.

Interpretation of the CC&Rs

¶2 The facts in this case are essentially undisputed, and we refer to them only as necessary to resolve each issue.[2] The Sisneroses first argue the trial court erred by concluding their short-term vacation rental of their property violated the CC&Rs applicable to the La Cebadilla Estates subdivision. They claim their use is indistinguishable from any other landlord-tenant relationship and, thus, is not prohibited. The Association responds that the trial court's factual findings and the plain language of the CC&Rs support the injunction. We review the grant of injunctive relief for an abuse of the trial court's discretion. *Horton v. Mitchell*, 200 Ariz. 523, ¶ 12, 29 P.3d 870, 873 (App. 2001). "We defer to the court's findings of fact unless clearly erroneous, but we review de novo its legal conclusions." *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, ¶ 9, 156 P.3d 1149, 1152 (App. 2007). "We also interpret deed restrictions de novo." *Wilson v. Playa de Serrano*, 211 Ariz. 511, ¶ 6, 123 P.3d 1148, 1150 (App. 2005).

¶3 Article 5 of the CC&Rs, the provision at issue, reads:

> The property in the subdivision will be put to no use other than herein specified. No business or profession of any nature which solicits the general public to the residence shall be conducted on any lot or in any residence or building constructed thereon. There shall not be permitted or maintained any nuisance on said property.

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[2]The Sisneroses do not challenge any of the trial court's extensive factual findings, only its legal conclusions, and they have included few citations to the factual record to support numerous assertions made in their briefs. *See* Ariz. R. Civ. App. P. 13(a)(6).

Based on the evidence presented at trial, the court found the Sisneroses' activities on Lot 90 "constitute[] a business which 'solicits the general public to the residence'" and concluded the Association was entitled to an injunction prohibiting that activity. After the Sisneroses objected to the form of judgment lodged by the Association, the trial court confirmed its decision, stating: "[T]he short-term rental business as currently run by Defendants is in conflict with the CC&Rs and is impermissible."

¶4 In *Powell v. Washburn*, 211 Ariz. 553, ¶ 7, 125 P.3d 373, 375 (2006), our supreme court recently adopted "a clear statement of how to interpret" restrictive covenants governing real property, such as CC&Rs.[3] The court held "restrictive covenants should be interpreted to give effect to the intention of the parties as determined from the language of the document in its entirety and the purpose for which the covenants were created." *Id*. ¶ 1. The words in the document are given their ordinary meaning, "the best evidence of which is the words themselves." *Wilson*, 211 Ariz. 511, ¶ 10, 123 P.3d at 1151. "Such covenants 'should not be read in such a way that defeats the plain and obvious meaning of the restriction.'" *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, ¶ 19, 87 P.3d 81, 85 (App. 2004), *quoting Arizona Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 449, 868 P.2d 1030, 1032 (App. 1993).

¶5 The purpose of the CC&Rs governing La Cebadilla Estates is "to protect and enhance the value, use, desirability and attractiveness of real property encompassing La

[3]In *Powell*, the court expressly adopted the approach of the Restatement (Third) of Property (Servitudes) § 4.1(1) (2000), abandoning Arizona's previous policy of narrow construction. 211 Ariz. 553, ¶ 1, 125 P.3d at 374.

Cebadilla Estates and each Lot therein and the character of the natural desert terrain." The Association was "formed for the specific purpose of holding certain real property and improvements ('common areas') for the use and benefit of the owners" of parcels in the subdivision and "to provide maintenance, preservation and architectural control of the residential lots and common areas." The CC&Rs also provide for "[c]ommon [p]roperties," which are "devoted to the common use and enjoyment of the members of the [Association] and their immediate families." A member of the Association is defined as "the owner or owners of record of a parcel." Finally, the CC&Rs limit the structures to be placed on any parcel to "one single-family dwelling house" of no less than 2,000 square feet, "one guest house which shall not exceed 1,500 square feet," and "stables and appurtenant outbuildings."

¶6 Before trial, both parties agreed the Sisneroses were "conducting a short-term vacation rental activity *out of the property*." (Emphasis added). At trial, Melissa Sisneros admitted that she and her husband operated a business, Sisneros Investments, whose Internet website showed its business address as "2302 North Camino Casabel," the street address for Lot 90; that, at least once, interested parties had "come to view the house in advance of renting it"; and that the property had been advertised on the Internet for rent by the day, weekend, or week since April 2006, with the first actual rental in May 2006. She agreed her advertisements stated all linens, toiletries, towels, and household items were provided, "[j]ust like a hotel would offer," and offered daily maid service, a cook, and a chauffeur as amenities of the property. Finally, she testified that the exhibits presented by the Association were printed copies of advertisements for the property. When asked to whom the property

was rented, she replied "different people" and "[i]t just depends." Melissa also indicated she had a business license for her rental business, which encompassed four properties at the time of trial, and noted there had been "investors" involved in the Sisneroses' purchase of this property.

¶7 Dino Sisneros testified that he had "assumed" renting their residence to vacationers was acceptable because a nearby property "was trying to open a bed and breakfast." But he admitted they had learned the bed and breakfast property was not within La Cebadilla Estates, merely located nearby. Dino also testified that the Sisneroses had been in the vacation-rental business for "the past year-and-a-half" and that a business permit for a vacation-rental business existed, although he was unsure if it covered the residence on Lot 90.

¶8 Six printed copies of advertisements were admitted into evidence. The Sisneros Investments website, as of the day before trial, listed four available rental homes as "a delightful alternative to [h]otel accommodations," claimed to "provide the best professional guest services in the area," and stated "our private vacation homes include all the services you need, are fully furnished including bed and bath linen, purified water, cookware and dishes, and we provide maid service." This site also showed the address for Sisneros Investments as "2302 North Camino Cascabel" and advertised this home as being located "in [L]a [C]ebadi[l]la [E]states," "overlook[ing L]a [C]ebadi[l]la [L]ake." This listing offered the home for rent by the week for up to 14 guests. Several other websites displayed similar advertising, including one that offered a minimum stay of one night for "a

maximum of 16 people," emphasized the home's location in La Cebadilla Estates and listing household staff and supplies as amenities of the property. All but one of these advertisements stressed the property's location within La Cebadilla Estates and promoted La Cebadilla Lake as an amenity of the property.

¶9 The Sisneroses cite six cases, all from other jurisdictions. Those cases, however, are all from states which construe restrictive covenants "in favor of the free use of land, as a matter of law." *Pinehaven Planning Bd. v. Brooks*, 70 P.3d 664, 668 (Idaho 2003); *see also Lowden v. Bosley*, 909 A.2d 261, 266 (Md. 2006); *Mullin v. Silvercreek Condo. Owner's Ass'n*, 195 S.W.3d 484, 490 (Mo. Ct. App. 2006); *Catawba Orchard Beach Ass'n v. Basinger*, 685 N.E.2d 584, 588 (Ohio Ct. App. 1996); *Yogman v. Parrott*, 937 P.2d 1019, 1023 (Or. 1997); *Scott v. Walker*, 645 S.E.2d 278, 280 (Va. 2007). As noted earlier, Arizona has abandoned that policy in favor of the Restatement approach which relies on the intent of the parties. *See Powell*, 211 Ariz. 553, ¶ 1, 125 P.3d at 374. And, none of those cases involved a restriction similar to the operative one here, barring the use of property to conduct a business that solicits the public to the residence in question, upon which the trial court's ruling relied.

¶10 The Sisneroses also raise the argument that only "tenants, not the general public, go there." However, this contention is unpersuasive in light of the evidence presented at trial, including Melissa Sisneros's inability to identify who rented the property, her testimony that "the renter" is the "person who I have the driver's license from," her admission that at least one prospective guest had gone to inspect the property before agreeing

to rent it, and the lack of any lease or rental documents in the record. Although on appeal, the Sisneroses describe their customers as "tenants," their business advertised for and offered to provide services to "guests," who potentially could be different persons every day.

¶11 The CC&Rs, as quoted above, prohibit the operation on any lot within the subdivision of a business that solicits the general public to the property. Although much of the Sisneroses' activity on the property, taken in isolation, is arguably not inconsistent with the CC&Rs, taken as a whole, we cannot say the trial court erred. Melissa and Dino Sisneros testified Lot 90 was one of Sisneros Investments' portfolio of rental homes, all purchased with the assistance of investors, which include "professional guest services" in their rental rates. The Sisneroses admitted they had a business permit for Sisneros Investments to rent the home and testified about the competition in the Tucson vacation-rental market. The evidence included an exhibit showing Sisneros Investments' business address as 2302 North Camino Cascabel, or Lot 90, as of the day before trial. And, although Melissa Sisneros claimed she did not conduct business at the property, the trial court was not required to accept that statement. *See Premier Fin. Servs. v. Citibank (Arizona)*, 185 Ariz. 80, 85, 912 P.2d 1309, 1314 (App. 1995) ("It is not our prerogative to weigh the evidence and determine the credibility of witnesses; that role belongs to the trial court.").

¶12 Because Sisneros Investments is a business, not an individual, it is incapable of residing at the property; it can only conduct business there. The evidence showed that, at a minimum, "professional guest services" were provided regularly by Sisneros Investments at the Lot 90 property, and the trial court could reasonably infer that other business was

conducted there as well, such as meeting with guests to obtain identification, have rental agreements signed, or provide keys to the property. The court found the short-term vacation-rental business conducted by Sisneros Investments "not comparable with a longer-term rental . . . as a primary residence" but "more compatible with a hotel." *See Flying Diamond*, 215 Ariz. 44, ¶ 9, 156 P.3d at 1152 (unless clearly erroneous, reviewing court defers to lower court's findings of fact). Accordingly, we cannot say the trial court erred in concluding the Sisneroses were operating on Lot 90 a business that solicited the general public to the residence in violation of Article 5 of the CC&Rs.

Breadth and Vagueness of the Injunction

¶13 The Sisneroses next contend the injunction is overly broad and so vague that they are unable to discern what rentals would be permitted. But the trial court's original ruling clearly prohibits the Sisneroses "from utilizing Lot 90 in connection with [their] vacation-rental business or for any substantially similar business purpose which invites the general public to the premises." This statement follows extensive factual findings delineating the specific activities the trial court relied upon in determining that the Sisneroses' business solicited the general public to the residence.

¶14 After the Association lodged a form of judgment, the Sisneroses objected, claiming it was vague and only arbitrarily enforceable. The trial court reiterated its ruling, stating:

> The totality of the circumstances as presented by testimony and other evidence indicated that the Defendants were violating the CC&Rs by running a business[,] not simply renting a house. Solicitation of the general public to the property was the issue

> in front of this court, as this was the behavior prohibited by the CC&Rs, and the form of judgment specifically and unambiguously prohibits this solicitation.

The Sisneroses claim on appeal the order is vague because the issue turns on "what is an acceptable rental period." However, the injunction clearly prohibits the Sisneroses from their current use, which involves marketing and renting the residence as a short-term "vacation getaway," a use the trial court found "much more compatible with a hotel than with someone who is renting their house for residential purposes."[4] Despite the Sisneroses' attempt to recast the issue, we cannot say the trial court's order enjoining the use of Lot 90 as a vacation-rental property is vague or overly broad.

Unclean Hands Allegations

¶15 The Sisneroses contend the trial court erred in enjoining their use of Lot 90 because "[e]quitable relief is not available to one who comes before the Court with unclean hands," and the Association "cannot sue the Appellants for violating the very provision the Appellee has been violating for years." The Sisneroses maintain that the Association's "unclean hands" result from a long-standing agreement which permits guests of the adjacent Tanque Verde Guest Ranch to use the Association's horse trails and reciprocally permits

[4]It is notable that the evidence includes a letter from Melissa Sisneros to her neighbors in La Cebadilla Estates, stating that she, her husband, and four children "live across the street from you." At trial, she admitted the property was being advertised as a vacation rental at that time.

residents of La Cebadilla to use the Ranch's trails, which afford direct access to Saguaro National Park East.[5]

¶16 At trial, the evidence about this agreement showed that no member of the Association had ever complained about it, that the agreement had been created between the Tanque Verde Guest Ranch and the original seller of the property when La Cebadilla was developed in the early 1970's, and that the Ranch owns a lot within the subdivision which serves as one means of access between the two trail systems. The trial court found the reciprocal use agreement benefitted all members of the Association by providing them access to the trails on the Ranch.

¶17 "The application of the 'clean hands' doctrine rests in the sound discretion of the trial court." *Manning v. Reilly*, 2 Ariz. App. 310, 314, 408 P.2d 414, 418 (1965). Moreover, as the Sisneroses acknowledge in their brief, quoting *Barr v. Petzhold*, 77 Ariz. 399, 407-08, 273 P.2d 161, 166 (1954), for the doctrine "to apply to bar a claim, it is necessary that the act of unconscionable conduct on the part of plaintiff relate to the very activity that is the basis of his claim. 30 C.J.S., Equity, §§ 93, 98, pages 476, 491-493." The Sisneroses have not alleged, much less demonstrated, that the Association permitted other property owners to operate vacation homes.[6] And it is difficult to fathom how the reciprocal

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[5]At trial, the Sisneroses attempted to demonstrate other uses that they claimed violated the CC&Rs. However, they were unable to show the equine breeding facility, stable, and bed-and-breakfast properties they complained of were actually located within La Cebadilla Estates and subject to the CC&Rs and have not raised those claims on appeal.

[6]In fact, during her testimony, the president of the Association stated that, to the best of her knowledge as president, the Association had never granted a variance to the restrictive

trail-use agreement could be deemed unconscionable. Accordingly, the Sisneroses have not shown how the trial court abused its discretion in finding the agreement did not prevent the Association from enforcing the CC&Rs that prohibit the Sisneroses' vacation-rental business. *Manning*, 2 Ariz. App. at 314, 408 P.2d at 418.

Unjust Enrichment Claim

¶18 The Sisneroses next claim the trial court erred by not dismissing the allegations of the complaint seeking damages based on a claim of unjust enrichment. Although the trial court, in an unsigned minute entry following the trial, did include a conclusion of law that the Sisneroses "should make compensation to [the Association]," the May 10 judgment from which the Sisneroses appeal states that "the issue of what disgorgement of money—if any—[the Sisneroses] must make as a result of [the Association's] unjust enrichment claim [had been] bifurcated from the consolidated trial (to be heard subsequently)." Clearly, the May 10 order does not award any damages for unjust enrichment and is not a final, appealable order on that issue. Because the trial court has not yet entered a final order or judgment relating to unjust enrichment, this court has nothing to review. *See* A.R.S. § 12-2101; *Klebba v. Carpenter*, 213 Ariz. 91, ¶ 9, 139 P.3d 609, 611 (2006); *O'Brien v. Superior Court*, 102 Ariz. 570, 572, 435 P.2d 44, 46 (1967); *In re Paternity of Gloria*, 194 Ariz. 201, ¶ 25, 979 P.2d 529, 533-34 (App. 1998).

¶19 At oral argument, the Sisneroses relied on *Bilke v. State*, 206 Ariz. 462, ¶ 5, 80 P.3d 269, 270 (2003). But that case has no bearing on the situation here. In *Bilke*, the trial

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covenant in question.

court had entered a final judgment "resolv[ing] the parties' rights as to liability" at the request of one party "so that it could immediately appeal." *Id.* ¶ 5. There was no similar request in this case, and no such language in the trial court's final order. And, to the extent the Sisneroses challenge the trial court's denial of their motion to dismiss, that order was properly reviewable by way of special action, not appeal. *See Qwest Corp. v. Kelly*, 204 Ariz. 25, ¶ 3, 59 P.3d 789, 791 (App. 2002).

Sufficiency of the Evidence

¶20 The Sisneroses next complain there is insufficient evidence to support the trial court's finding that the exterior lights of Lot 90 violated Article 15, Section 6 of the CC&Rs.[7] The gist of the Sisneroses' argument is that no photograph of the lighting was admitted at trial. We note, however, that Exhibit I-1 appears to be, and was admitted as, a photograph of the residence on Lot 90 at night. "We must review the evidence in a light most favorable to sustaining the . . . verdict and affirm the judgment if substantial evidence supports it." *Flanders v. Maricopa County*, 203 Ariz. 368, ¶ 5, 54 P.3d 837, 840 (App. 2002).

¶21 Two witnesses testified about the lights on Lot 90. The first stated she lived on Lot 24 of La Cebadilla Estates and could see the lights both from her lot, which is not contiguous with Lot 90, and while driving down Redington Road. The lights were not, in her judgment, "indirect" or "controlled and focused" as required in the CC&Rs. She characterized them as "lots of lights all over the house," noted they could be seen "quite

[7]That provision states in relevant part, "Any exterior lighting installed on any lot shall be indirect or of such controlled focus and intensity as not to disturb residents of adjoining property."

significantly," and stated she found them "visually disturbing." The other witness testified she had personally observed the lights on Lot 90 and found "an awful lot of lights" located "on the gate," "up the driveway," "on the side of the building," and "on various parts of the front," of which "some were left on during the day." She also could see the lights from the roads and, at night, found them "very bright." She agreed that Exhibit I-1 appeared to be a fair representation of Lot 90 at night.

¶22 The Sisneroses cite *Ray Korte Chevrolet v. Simmons*, 117 Ariz. 202, 208, 571 P.2d 699, 705 (App. 1977), to support their claim. The court in *Ray Korte* found, in the context of a motion for mistrial based on attorney misconduct, no reversible error in opposing counsel's comment on a party's failure to call a particular witness. *See id*. We can find no relevance in that case to this issue.

¶23 Based on the evidence, we cannot say the trial court erred in its assessment of the witnesses' testimony and Exhibit I-1, or in finding the exterior lights of Lot 90 violated the applicable provision of the CC&Rs and thus enjoining the Sisneroses from continuing to use them without modification. *See Flanders*, 203 Ariz. 368, ¶ 5, 54 P.3d at 840.

Denial of Jury Trial and Continuance

¶24 The Sisneroses next complain they were deprived of their right to a jury trial and wrongfully denied a continuance. The complaint in this case was filed in September 2006, contemporaneously with a motion for a preliminary injunction and a motion to bifurcate and advance the trial on the merits to consolidate it with the hearing on the

preliminary injunction, pursuant to Rule 65(a)(2), Ariz. R. Civ. P.[8] When service of process was attempted at the Sisneroses' residence, they refused to answer the door and then instructed the guard at their gated community to refuse the process server entry in the future. The Sisneroses also refused to permit their counsel to accept service on their behalf, and they were eventually served by publication under Ariz. R. Civ. P. 4.2(f). The published notice included the complaint and both motions.

¶25 The Sisneroses and their counsel were present on December 11, 2006, at a hearing on the motion to bifurcate the claims and consolidate the preliminary injunction hearing with the trial on the merits. At that hearing, the trial court granted the motion and set the trial for Monday, January 29, 2007. The Sisneroses then filed a motion seeking to dismiss the complaint and requested a hearing, which was set for January 22. The Sisneroses did not request an expedited hearing on their motion, which the court denied at the January 22 hearing. On January 24, a Wednesday, the Sisneroses filed a motion to continue on the ground they had not yet filed their answer. The next day, they filed a demand for jury trial on the same grounds. The Association opposed both requests, which the trial court denied on the first day of trial.

¶26 A party may waive its right to a jury trial by failing to make a timely demand. *Mason v. Cansino*, 195 Ariz. 465, ¶ 4, 990 P.2d 666, 667 (App. 1999) ("the right to a jury trial in civil cases is presumptively waived unless at least one litigant demands a jury trial

[8]Although the Sisneroses characterize the motion to consolidate as an *ex parte* motion, the Association repeatedly attempted to serve them with the complaint and both motions and eventually included all three pleadings in the publication notice.

under Rule 38(b) or (c), Ariz. R. Civ. P."); *Johnson v. Mofford*, 193 Ariz. 540, ¶ 36, 975 P.2d 130, 137 (App. 1998). Rule 38(b), Ariz. R. Civ. P., requires a demand to be made either when the case is set for trial or within ten days after a motion to set is served, whichever occurs first. But Rule 38(b) makes no mention of the filing of an answer as a prerequisite to demanding a jury trial. The record here shows the Sisneroses and their counsel were present in open court on December 11 when the trial date was set for January 29. No motion to set was filed in this case. The Sisneroses filed their jury trial demand forty-five days after the trial date was scheduled. We cannot say the trial court abused its discretion in refusing the Sisneroses' untimely jury trial demand, regardless of what tactical decisions their counsel made. *See Mason*, 195 Ariz. 465, ¶ 4, 990 P.2d at 667; *Johnson*, 193 Ariz. 540, ¶ 36, 975 P.2d at 137.

¶27 Moreover, as the trial court noted, at neither the December 11 or January 22 hearing did the Sisneroses inform the court they could not be ready for trial on January 29. We review the denial of a motion to continue for an abuse of discretion. *See McDowell Mountain Ranch Land Coal. v. Vizcaino*, 190 Ariz. 1, 5, 945 P.2d 312, 316 (1997). Rule 38.1(h), Ariz. R. Civ. P., provides: "[W]hen an action has been set for trial on a specified date by order of the court, no postponement of the trial shall be granted except for sufficient cause, supported by affidavit, or by consent of the parties, or by operation of law." The trial court stated, during the hearing on February 1, "[Y]ou had plenty of notice . . . . You've had since December 11th to be aware of this hearing taking place." We cannot say, in light of the complete lack of timely objection by the Sisneroses to the trial date, either when it was

set or in the subsequent weeks, that the trial court abused its discretion in denying their motion to continue the trial. *See McDowell Mountain*, 190 Ariz. at 5, 945 P.2d at 316.

¶28 Although the Sisneroses invoke *Paris-Phoenix Corp. v. Esper*, 112 Ariz. 320, 541 P.2d 917 (1975), to support their claim that Rule 65(a)(2) is not designed to deprive a litigant of its right to discovery, that is not what happened here. Because the Sisneroses' counsel chose not to file an answer, despite knowing the trial date had been set and was approaching, they had no opportunity to conduct discovery.[9] However, we again note that the Sisneroses did not object to the trial date or request a continuance until five o'clock on the Wednesday before a Monday trial. *Paris-Phoenix* is inapposite because it holds a litigant must have notice, at or before the hearing, that a request for preliminary injunction and trial on the merits have been consolidated. *Id*. at 321, 541 P.2d at 918. The parties in that case were not informed until after the hearing had concluded that the trial court had, *sua sponte*, consolidated the two hearings. *Id*. at 320, 541 P.2d at 917. We see no error in the trial court's decision here because the Sisneroses had ample notice the court was permitting consolidation of the injunction hearing and trial, yet failed to object. *See Riess v. City of Tucson*, 19 Ariz. App. 579, 580, 509 P.2d 651, 652 (App. 1973) (having been apprised of court's decision and not objecting at any stage of proceedings, "appellant is in no position to complain of the matter on appeal"). We cannot say the trial court erred in denying either the Sisneroses' demand for jury trial, *see Mason*, 195 Ariz. 465, ¶ 4, 990 P.2d at 667;

[9]The record does contain a receipt issued on December 11 in the name of Melissa Sisneros for the filing fee to accompany an answer. However, the answer itself was filed on February 8.

Johnson, 193 Ariz. 540, ¶ 36, 975 P.2d at 137, or their motion to continue. *See McDowell Mountain*, 190 Ariz. at 5, 945 P.2d at 316.

Written Complaint Requirement

¶29 The Sisneroses also argue that Article 24 of the CC&Rs should be construed as creating a "condition precedent" that a signed written complaint be received by theAssociation's Deed Restriction Committee before the Board may act. But there was testimony at trial that a written complaint is only one method of bringing violations to the Board's attention and that a Board member's personal observation or a verbal complaint at a Board meeting would also suffice. The Sisneroses point to no language in the CC&Rs requiring a written complaint before the Board may act. And the only case on which the Sisneroses rely is inapplicable here. *Albers v. Edelson Technology Partners L.P.*, 201 Ariz. 47, 31 P.3d 821 (App. 2001), involved a derivative action by the shareholders of a corporation who were statutorily required to submit demands in writing, and there is no derivative action or analogous statutory requirement in this case. The Sisneroses have offered nothing further to refute the trial court's factual finding that Article 24 provided a nonexclusive mechanism for property owners to complain of CC&R violations.

Attorney Fees

¶30 Finally, the Sisneroses contend that, if the judgment of the trial court is reversed, the award of attorney fees to the Association should also be reversed. However, we uphold the trial court's order and thus do not reverse the award of fees. The Association

has also requested its fees on appeal pursuant to A.R.S. § 12-341.01 and *Arizona Biltmore Estates Association v. Tezak*, 177 Ariz. 447, 868 P.2d 1030 (App. 1993). In the exercise of our discretion, we grant the Association reasonable attorney fees on appeal upon its compliance with Rule 21, Ariz. R. Civ. App. P. *See Pinetop Lakes Ass'n v. Hatch*, 135 Ariz. 196, 198, 659 P.2d 1341, 1343 (App. 1983) (action to enforce restrictive covenant in deed arises out of contract and A.R.S. § 12-341.01 applies); *see also Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, ¶ 39, 87 P.3d 81, 88-89 (App. 2004).

Disposition

¶31 Based on the foregoing, the trial court's judgment and order entering a permanent injunction against the Sisneroses and awarding attorney fees to the Association is affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge